

MEMORANDUM TO: The Board of Directors

FROM: Sandra L. Thompson
Acting Director
Division of Supervision and Consumer Protection

SUBJECT: Final Statement of Policy Regarding the National
Historic Preservation Act of 1966

Summary

The National Historic Preservation Act (NHPA) sets forth a national policy to promote the preservation of historic resources. The NHPA requires, in part, that all Federal agencies consider the effects of their undertakings on historic properties. In this regard, the FDIC considers applications for deposit insurance for *de novo* institutions and applications by state non-member banks to establish a domestic branch and to relocate a domestic branch or main office (collectively, “Covered Applications”) to be undertakings for the purposes of the NHPA. Because Congress amended the NHPA and the Advisory Council on Historic Preservation (Advisory Council or ACHP) revised its regulations regarding the NHPA, the Division of Supervision and Consumer Protection (DSC) recommends final revisions to the FDIC’s Statement of Policy (Statement or SOP) on the NHPA. The revised SOP will conform to those amendments and revisions and is based on the comments received as a result of the proposed SOP issued for comment in October, 2005.

Recommendation

DSC recommends that the Board issue the final Statement that would replace the current, outdated Statement.

Background

The NHPA, as amended in 2000, is the primary historic preservation law affecting Covered Applications and outlines the historic preservation responsibilities of Federal agencies. These responsibilities include considering the effects of Federal agency undertakings on historic properties and affording the Advisory Council a reasonable opportunity to comment on such undertakings before they occur.

In 1997, the FDIC initiated discussions with the Advisory Council to develop a Programmatic Agreement (Agreement). Such an Agreement is considered appropriate when effects on historic properties are similar and repetitive, multi-state or multi-regional

in scope, or when non-Federal parties are delegated major decision making responsibilities. The FDIC sought to exempt certain types of *de novo* and branch applications, and also to authorize Applicants to initiate decision making directly with the relevant State or Tribal Historic Preservation Officers (SHPO/THPO). This effort continued into 2002 without developing an Agreement that was satisfactory to the Advisory Council and the FDIC. Given the lack of an Agreement acceptable to both the FDIC and Advisory Council, staff recommended revising the current Statement adopted by the Board on March 31, 1980 to reflect changes in the NHPA and its implementing regulations. Efforts to revise the Statement were delayed because of the uncertain status of the Advisory Council's regulations due to court challenges considered during the period of 1999 to 2004.

Comments Received

On October 18, 2005, the FDIC issued a request for comment on the proposed Statement of Policy Regarding the NHPA. (70 FR 60523) The FDIC received 11 comments on the proposed Statement of Policy: a comment from the Advisory Council (more fully described below), five comments from State Historic Preservation Offices, three comments from other individuals/organizations interested in historic preservation, and two comments from financial institution representatives. While a number of commenters supported the proposed SOP, others did not. Comments from the various historic preservation organizations generally requested that terminology used in the SOP conform to the terminology used in the Advisory Council's implementing regulations. In addition, commenters also suggested clarifying the consultation process, streamlining consultation with state and national organizations, and educating applicants regarding the availability of additional resources valuable to assessing proposed undertakings. The SOP has been revised to address many of these concerns.

Advisory Council Comment

The Advisory Council's comment stated that, "In its present format the ACHP cannot endorse the proposal...since it does not comport with our regulations." The Advisory Council suggested that the FDIC delay revising the SOP "pending further consultation with the ACHP, the National Conference of State Historic Preservation Officers, Indian tribes, and a review of the public comments received in response to the Federal Register notice." As an overall issue, the Advisory Council believes that the process described in the proposed SOP did not reflect all the steps outlined in, or the information required by, its regulations. Instead, it believes the proposals included in the SOP modify the process set forth in the Advisory Council's regulations in a manner that may compromise the FDIC's ability to demonstrate that it followed those regulations. The Advisory Council suggested that the FDIC modifications to the SOP required approval by the ACHP through one of the alternatives set forth in its regulation. In particular, it commented that the proposed SOP modifies the coordination of the initial step of the review process, which requires the FDIC to specify if the process is being coordinated with other applicable reviews, identify consulting parties, and develop a plan to involve the public. As such, the FDIC must issue delegations of authority letters to

applicable SHPOs and THPOs authorizing Applicants to act on the FDIC's behalf to initiate the consultative process. The Advisory Council also raised a concern about Applicants altering properties prior to considering the NHPA issues and requirements. The Advisory Council raised the issue of "anticipatory demolition" or the modification of a property by an Applicant prior to the determination that no Historic Property was affected. Section 110(k) of the NHPA provides that a Federal agency cannot approve a license (in this case a "Covered Application") if the Applicant intentionally altered an Historic Property in order to avoid the requirements of the NHPA unless the Federal agency makes a finding that the circumstances justify granting the license. The Advisory Council requested that a warning to Applicants relative to Section 110(k) of the NHPA be incorporated into the SOP. The Advisory Council also suggested that additional background information be included when an Historic Property may be affected.

The Advisory Council was contacted telephonically in order to obtain additional clarification regarding their comment letter. After the teleconference, they provided additional written comments regarding the manner in which the FDIC could delegate to Applicants the initiation of the consultation process, requested that the FDIC emphasize the Section 110(k) reference in the body of the SOP, and revise certain language to clarify the SOP.

Final Statement of Policy

Staff recommends that the SOP be modified in a number of ways to address several of the points raised in the comments. In response to concerns raised by the Advisory Council, the SOP has been amended to state expressly that the purpose is to provide guidance that supplements, but does not alter, FDIC regulations and those of the Advisory Council. We have added cross-references to relevant statutes, regulations, and executive orders, but we have not reproduced or extensively summarized those materials in the SOP. In this regard, several areas that could have been viewed as more than general guidance were eliminated or modified. Terminology was conformed to language in the Advisory Council regulations; most notably, the SOP now references "consultation" with the state and tribal entities, rather than "clearance" from such entities. The SOP has been revised to specify that the FDIC and Applicants will consult with Indian tribes that may attach religious and cultural significance to sites located off of tribal lands. In addition, the SOP has been revised to include a list of other potential resources that Applicants may use to assess a proposed undertaking and to clarify the consultation process. In response to the comment regarding background documentation, the SOP now requires that Applicants submit an analysis of alternatives in cases where the undertaking may otherwise result in an adverse effect on an Historic Property.

The SOP has been revised to include language regarding Section 110(k) of the NHPA and to require a discussion of alternative activities when proposed undertakings may result in an adverse effect on an Historic Property. On the advice of the Advisory Council, the SOP was revised to serve as the requisite authorizations for Applicants to initiate the consulting process with SHPOs/THPOs and notification of such delegation to the SHPOs/THPOs.

Although some of the specific language revisions suggested by the Advisory Council were not implemented, we believe that overall the SOP addresses the significant concerns raised by the Advisory Council in their comment letter and subsequent communications. As such, we believe that the SOP as written is appropriate to meet the FDIC's goal of providing guidance to our Applicants while addressing the concerns of the Advisory Council.

Economic Growth and Paperwork Reduction Act of 1996

In addition to seeking general comments regarding the substance of the proposed Statement, and consistent with the spirit of the Economic Growth and Regulatory Paperwork Reduction Act, the October, 2005 proposal requested public comment to identify any areas of the proposed Statement that were outdated, unnecessary, or unduly burdensome. No specific comments were received in response to this request.

Conclusion

The SOP will result in an updated resource for Applicants and highlight the importance of the NHPA obligations. This SOP is expected to provide for more efficient processing and timely resolution of matters pertaining to the NHPA, which will benefit both the FDIC and affected Applicants. The Statement imposes no additional regulatory burden on financial institutions.

DSC recommends that the Board of Directors issue the final Statement.

Reviewed:

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Attachments

RESOLUTION

WHEREAS, on March 31, 1980, the Board of Directors (“Board”) of the Federal Deposit Insurance Corporation (“FDIC”) adopted a Statement of Policy Regarding the National Historic Preservation Act of 1966 (“NHPA”); and

WHEREAS, the Board has determined that it is appropriate for the FDIC to revise and amend the Statement of Policy Regarding the NHPA to provide a clear and more concise explanation of the FDIC’s procedures regarding the NHPA as that Act applies to the filing and processing of applications pursuant to 12 C. F. R. part 303, and to revise the Statement of Policy to reflect changes to the NHPA and its implementing regulations; and

WHEREAS, on October 6, 2005, the Board authorized proposed amendments to the Statement of Policy to be published for public comment in the Federal Register for a 60-day comment period; and

WHEREAS, pursuant to the request for comments, eleven comments were received and staff has reviewed the comments; and

WHEREAS, after a review of such comments, the Board has determined to revise the Statement of Policy; and

WHEREAS, the Board has determined, pursuant to 36 CFR § 800.2(c)(4), to authorize Applicants for *de novo* institutions and applications by state non-member banks to establish a domestic branch and to relocate a domestic branch or main office, to initiate the consultation process with State Historic Preservation Officers and Tribal Historic Preservation Officers and others but the FDIC remains legally responsible for all findings and determinations to which the FDIC is charged under the NHPA and 36 CFR part 800.

NOW, THEREFORE BE IT RESOLVED, that, after consideration of the comments received, the Board hereby adopts the revised Statement of Policy and authorizes the Executive Secretary, or his designee, to cause the Statement of Policy Regarding the NHPA as set forth in the attached Federal Register notice document to be published in the Federal Register, in a form and manner acceptable to the Executive Secretary, or his designee, and the Acting General Counsel, or his designee.

BE IT FURTHER RESOLVED, that the Board hereby delegates authority to the Executive Secretary, or his designee, and the Acting General Counsel, or his designee, to make technical or nonsubstantive changes to the attached notice to issue this document in the Federal Register and to take such other actions and issue such other documents incident and related to the foregoing as they may deem necessary or appropriate to fulfill the Board's objective in connection with this matter.